

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY P. PIERCE and DEPARTMENT OF THE ARMY,
MILITARY OCEAN TERMINAL, Sunny Point, NC

*Docket No. 97-2770; Submitted on the Record;
Issued November 9, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant received an overpayment of \$1,340.99 in compensation; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

In the present case, the Office accepted that appellant sustained a lumbar strain. Following a recurrence of disability, appellant stopped working on January 10, 1996 and received compensation for temporary total disability.

By notice dated May 16, 1997, the Office advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,340.99, which occurred when he was paid at an incorrect pay rate for the period February 14 through September 30, 1996. The Office further advised appellant that he was without fault in the creation of the overpayment. The Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment and asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial information would be used to determine whether he was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. The Office enclosed a worksheet detailing its calculation of the \$1,340.99.

In response to the May 16, 1997 preliminary determination, appellant checked a box on an Office form requesting waiver of his overpayment and a telephone conference. The Office received the request on June 17, 1997.

In addition, appellant submitted a completed overpayment recovery questionnaire which the Office also received on June 17, 1997. In the overpayment recovery questionnaire, Form OWCP-20, appellant indicated that he received \$26,600.00 per year in earnings and that his wife received \$26,000.00 per year in earnings. He also stated that he received \$746.00 per month in

workers' compensation and that he had \$47.00 in a credit union account. Appellant also listed his monthly expenses including \$500.00 for food, \$100.00 for clothing, \$1,115.00 for rent or mortgage, \$150.00 (estimated) for water, \$317.00 for automobile loan, \$80.00 for gas and oil, \$50.00 for miscellaneous, and \$470.00 in "other liabilities." Appellant also listed yearly expenses including \$1,200.00 in automobile insurance, \$250.00 in medical expenses not reimbursed, and \$1,200.00 in regular charitable contributions.

By decision dated June 19, 1997, the Office finalized its preliminary determination that appellant received a \$1,340.99 overpayment and that he was without fault in the creation of the overpayment. The Office determined that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment and noted that appellant's failure to provide the requested financial information did not allow for a finding that recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.

The Board finds that appellant received a \$1,340.99 overpayment of compensation.

The Office case history inquiry records indicate that appellant was paid utilizing a compensation rate of \$753.89 for the period February 14 through September 30, 1996. Appellant's Form CA-7 dated October 26, 1993, however, indicated that his weekly pay rate was \$695.23. This amount was based on appellant's yearly salary of \$27,706.00, premium pay of \$6,926.50, and Fair Labor and Standards Act pay of \$1,519.49. Consequently, the Office calculated the amount of compensation appellant received utilizing the incorrect pay rate. In its disability benefits payment worksheet, the Office indicated that appellant received \$1,224.00 from February 14 through February 29, 1996 and \$16,783.71 for the period March 1 through September 30, 1996. The total amount appellant received utilizing the incorrect pay rate was therefore \$19,348.70. The Office then calculated the amount of compensation appellant should have received for this period utilizing the proper pay rate of \$695.23. The Office indicated that for the period February 14 through February 29, 1996 appellant was actually entitled to \$1,224.00 based on his receiving 75 percent of his \$695.23 actual pay rate. The Office further calculated that for the period March 1 through September 30, 1996 appellant was actually entitled to \$16,783.71 based on his receiving 75 percent of his \$696.23 pay rate and a cost-of-living augmentation effective March 1, 1996. The Office totaled the amount appellant should have received based on his actual pay rate of \$18,007.71 and subtracted that amount from the \$19,348.70 he actually received to properly determine that appellant received an overpayment of \$1,340.99.

The Board finds that the case is not in posture for decision regarding whether the Office properly refused to waive recovery of the overpayment.

In the present case, appellant completed and submitted an overpayment recovery questionnaire, received by the Office on June 17, 1997, and requested a telephone conference to address his request for a waiver of his overpayment. However, the Office did not consider appellant's overpayment recovery questionnaire or conduct a telephone conference before denying appellant's request for waiver. In fact, the Office indicated in its June 19, 1997 decision that appellant failed to provide the requested financial information.

As the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,¹ it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.² As the Board's decisions are final as to the subject matter appealed,³ it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office. This is particularly important in the instant appeal where, as noted above, appellant requested waiver, submitted evidence on overpayment recovery questionnaire, and requested that there be a conference call on the matter, but where there is no indication that any of this was considered by the Office before denying appellant's request for waiver. Because it does not appear that the Office considered the evidence that it received on June 17, 1997, in reaching its June 19, 1997 decision, the Board cannot review such evidence for the first time on appeal.⁴

Consequently, the case must be remanded for the Office to consider appellant's request for waiver, his overpayment recovery questionnaire, and his request for a telephone conference.⁵ Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on this aspect of the claim.

The June 19, 1997 Office of Workers' Compensation Programs' decision is affirmed with regard to the fact and amount of the overpayment; the decision is set aside for further development consistent with this decision with regard to waiver of the overpayment.

¹ 20 C.F.R. § 501.2(c).

² See *William A. Couch*, 41 ECAB 548 (1990).

³ See 20 C.F.R. § 601.6(c).

⁴ See 20 C.F.R. § 501.2(c).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Conferencing*, Chapter 2.500 (July 1995); Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(3) (September 1994).

The November 8, 1994 Office of Workers Compensation Programs' decision is affirmed with regard to the fact and amount of the overpayment and the decision is set aside for further development consistent with this decision with regard to waiver of the overpayment.

Dated, Washington, D.C.
November 9, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member